No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK, *et al.*,
Petitioners,

v.

PALOMA GAOS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national voluntary bar association founded in 1946 to safeguard the right of all Americans to seek legal recourse for wrongful injury, strengthen the civil-justice system, and protect access to the courts. AAJ is the world's largest trial bar association, with members in the United States, Canada, and abroad. Throughout its 70-year history, AAJ has served as a leading advocate of the right to access to the courts for legal redress for wrongful injury.

This case is of acute interest to AAJ. AAJ's members frequently represent litigants in aggregate litigation, including class actions, in which cy pres settlements are fashioned by the parties and approved by the courts.[2] This brief draws on the experience of AAJ members in similar cases. AAJ is concerned that added restrictions on cy pres settlements are unwarranted and will undermine the effectiveness of class actions in vindicating the constitutional, statutory, and common law rights of Americans.

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioners and Respondents have consented to the filing of this brief.

[2] AAJ generally does not receive cy pres award money.

SUMMARY OF ARGUMENT

I. Cy pres-only settlements ensure that the objectives of class actions are met and preserve litigants' ability to bring class actions in small claims cases. Petitioners incorrectly argue that the sole purpose of class actions is to financially compensate class members. However, class actions also promote efficient and economical litigation and deter wrongdoing. Cy pres settlements help achieve these objectives, especially in cases where there are practical difficulties with distributing settlement funds to each class member individually.

Without the option of cy pres awards, non-distributable funds could revert to the defendant or escheat to the state. These options, however, ignore the objectives of class actions to deter wrongdoing and to benefit the class members. Both of those objectives are achieved when the non-distributable funds are awarded to cy pres recipients. Cy pres awards have a large-scale deterrent effect and benefit the class by going to a recipient with goals closely aligned to the issues central to the litigation. Class members can benefit on an even larger scale through cy pres awards than were they each to receive a financially insignificant share of the settlement.

Class actions allow plaintiffs to bring claims that are unlikely to be brought individually, and the availability of cy pres awards is vital to the settlement of these types of claims.

II. Petitioners make the baseless argument that the potential to obtain cy pres-only settlements incentivizes attorneys to bring class action cases in the first place. This is simply not true. First, there is no indication at the beginning of a case that the case is going to settle, or that any settlement will involve a cy pres-only award. Second, attorney compensation is not treated differently depending on whether the case is a "regular" class action or involves a cy pres-only award. The same requirements and safeguards exist in determining the reasonableness of attorneys' fees in either situation. Studies have shown that attorneys do not receive more money in cy pres-only class actions compared to any other class action. It is simply illogical to suggest that attorneys are any more incentivized to bring a case where the result may be a cy pres-only award.

Nor does the availability of cy pres relief make it more likely that a plaintiff's attorney will act in bad faith or disregard ethical rules. Indeed, there is no specific allegation in this case that the attorneys involved violated any code of conduct, but Petitioners allege that these types of cases *generally* give attorneys the *opportunity* to act badly. However, the mere possibility of unethical behavior should not trigger a far-reaching rule that cy pres-only settlements are inappropriate. Petitioners blatantly ignore the existence of the rules of professional responsibility to which attorneys must adhere, and improperly suggest that attorneys are acting in bad faith.

III. Beyond being a practical tool for the distribution of settlement funds, cy pres-only settlements

also have the added benefit of improving access to justice for litigants who may not otherwise have the ability to pursue a case. This Court has acknowledged the importance of access to justice and has specifically noted that the availability of class actions plays an important role therein. If class certification is deemed inappropriate in cases where there is a cy pres-only settlement, the ability of litigants in small stakes claims cases to bring a case will be negatively impacted. In addition, cy pres-only awards frequently go to charities that have "access to justice" as part of their mission. Thus, cy pres-only awards are in fact compatible with guidelines regarding the appropriateness of settlements and allow for greater access to the justice system. The objectives of class actions would not be achieved if cy pres-only settlements were disallowed as an option in these types of cases.

ARGUMENT

Cy pres settlements typically come in two forms. The first form is cy pres *remainders*, which is when, after an initial distribution to class members, there are distributions of leftover settlement funds to charities. The second form is what this brief labels "cy pres-only" settlements. These types of settlements occur when a settlement is deemed non-distributable to the class, and therefore instead goes almost entirely to a charity *instead of* first being distributed to class members. This case contemplates the adequacy of cy pres-only settlements when there is "no direct relief to class members." *See* Cert. Pet. Question Presented.

Though used throughout this brief, amicus AAJ first highlights that the term "cy pres-only" is misleading. A cy pres-only settlement does not mean that there is no relief to class members, nor does it mean that the entire settlement amount goes to a charity. For example, in this case there was injunctive relief in the form of a requirement that Google better inform users about the disclosure of their search terms. Gaos Br. 48. That is, the entire class received a direct benefit in the form of this injunctive relief. In addition, the settlement also included incentive awards for each class representative and reasonable attorneys' fees. *Id.* at 18. Thus, the settlement was not truly "cy pres-only," as the settlement included relief and benefits to class members apart from payments to charities.

Petitioners do not clearly distinguish between cy pres and cy pres-only settlements, and instead discuss the two different types of relief interchangeably. Moreover, Petitioners show little regard for the injunctive relief granted in this case and fail to recognize that there is in fact a direct benefit to class members here. Amicus AAJ supports cy pres-only settlements, which have the same safeguards as any other class action relief and are a necessary tool in cases where the distribution of monetary settlements in a class action is impracticable.

I. CY PRES-ONLY SETTLEMENTS ENSURE THAT THE OBJECTIVES OF CLASS ACTIONS ARE MET AND PRESERVE THE VIABILITY OF CLASS ACTIONS.

Class actions have objectives beyond monetary compensation to plaintiffs, and the potential for cy pres-only settlements in class actions supports those objectives. Class actions deter corporate wrongdoing, increase legal efficiency, and provide legal relief to small claimants while remedying a wrong to vulnerable members of society. *Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710, 728 (N.J. 2007).

Petitioners in this case ignore the various objectives of class actions and the benefits to class members provided by cy pres relief, and instead suggest that the purpose of class action is to provide compensation to the class and that cy pres-only settlements only create the "illusion of relief." Pet. Br. 20, 28. The value of class actions, however, extends well beyond the compensation of individuals. It has even been suggested that compensation "is just a by-product of a class action's regulatory function." Christine P. Bartholomew, *Saving Charitable Settlements*, 82 Fordham L. Rev. 3241, 3258 (2015). Indeed, "[m]ore critical than the limited compensatory relief now offered in these low-value class actions is the prospect that the law would be unable to deter future misconduct...." Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. Davis L. Rev. 805, 816 (1997).

The availability of cy pres-only settlements plays a major role in ensuring that the objectives of class actions, beyond compensatory relief alone, are met. Cy pres is useful in preserving the viability of class actions, and is a practical, judge-created tool allowing courts to direct a remaining portion of a settlement when class members cannot be located, or it is otherwise unreasonable to facilitate payment.

A. The Value and Objectives of Class Actions Extend Beyond Monetary Compensation Alone.

Class actions have value and purpose apart from monetary compensation to class members. For example, in enacting the Class Action Fairness Act of 2005, Congress expressly recognized the value of class actions in the legal system, stating "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." Pub. L. No. 109-2, 119 State. 4 (codified in scattered sections of 28 U.S.C.) § 2(a)(1).

This Court has similarly recognized the value of class actions, stating that a principal purpose of Rule 23 class actions is "the efficiency and economy of litigation." *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974). The usefulness of class actions extends not only to class members, but to other players as well. As explained by this Court, "[t]he justifications that led to the development of the class

action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980). *See also Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (stating that class actions save resources, not only for the parties, but also for the courts).

Class actions also have the goal of deterrence; that is, an objective to prevent future wrongs. *See Eisen v. Carllisle and Jacquelin*, 417 U.S. 156, 186 n.8 (1974) (Douglas, J., concurring) ("Judge Weinstein writing in the N.Y. Law Journal, May 2, 1972, p. 4, col. 3, said: 'When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least to deter—that conduct.'"); *see also* Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 Me. L. Rev. 223, 228 (2004) ("[I]t must be kept in mind that the objective of consumer class actions is not only compensation, but also deterrence and disgorgement of wrongful profits."); Bartholomew, *supra*, at 3264 ("Deterrent potential is a key reason consumers bring aggregate claims."). Class actions allow individuals to "supplement regulatory agencies both by requiring wrongdoers to give up their ill-gotten gains and by ferreting out misconduct that may have escaped the regulators' observance." Stephen C. Yeazell, *From*

Medieval Group Litigation To The Modern Class Action, 232 (1987).

Class actions aim to allow individuals to assert their legal rights, deter wrongdoing, and help to prevent future harm.

B. The Availability of Cy Pres Awards Advances the Value and Objectives of Class Actions.

Oftentimes in class action settlements, there are issues with distributing individual monetary amounts to each class member. As a result, there are leftover or non-distributable settlement funds. *See, e.g.*, *In re Motorsports Merchandise Antitrust Litig.*, 160 F. Supp.2d 1392, 1393 (N.D. Ga. 2001) (noting that "a fairly extensive body of caselaw has developed" addressing the difficulties of distributions to the settlement class); *Lane v. Facebook, Inc.*, 696 F.3d 811, 817-19 (9th Cir. 2012) ($6.5 million in settlement funds non-distributable); *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 169 (3d Cir. 2013) ($18.5 million less administrative expenses in excess settlement funds); *In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *7 (N.D. Cal. 2013) (noting that *de minimis* payout to individual class members would likely be nullified by distribution costs). The question becomes: what should the parties or the court do with leftover or non-distributable funds?

It is widely accepted that there are three main options for distribution of these funds: (1) reversion

to the defendant; (2) escheat to the state; (3) *cy pres* awards. *See Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990); Bartholomew, *supra*, at 3248; Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, 21 Va. J. Soc. Pol'y & L. 267, 269 (2014). Two of these options – reversion to defendant and escheat to state – fail to achieve the objectives of class actions.

First, were leftover or non-distributable funds simply to revert to the defendant, the defendant would be receiving a windfall in response to its alleged misconduct, with no motivation to change its behavior. Moreover, there would be no benefit to the class. Therefore, "[r]eversion to the defendant undermines the deterrent effect of class actions." Boies & Keith, *supra*, at 269. *See also* Matt Fenn, *The Use of Cy Pres in Class Action Settlements: The Best of Bad Options*, 6 (May 1, 2014), *available at* http://ssrn.com/abstract=2446989 ("Allowing a reversion of funds back to the defendant or refusing to certify the class seriously dampens the deterrent effect of class action litigation"). Second, escheat to the state provides no benefit to the class, only a benefit to the local government. Boies & Keith, *supra*, at 269.

The third option, cy pres awards, is one that achieves both the objective of deterring defendants while serving the interests of class members when individual compensation is impractical. "Cy pres awards...preserve the deterrent effect and allow

courts to distribute residual funds to charitable causes that reasonably approximate the interests pursued by the class action for absent class members who have not received individual distributions." Boies & Keith, *supra*, at 270.

Cy pres-only settlements are "a tool to promote the larger regulatory objectives underlying class action procedures, including access to justice and deterrence." Bartholomew, *supra*, at 3241. They not only deter defendants by requiring them to make a monetary payment, but also have a large-scale deterrent effect. For example, similarly-situated companies may see the class action settlement, such as a cy pres award of $9 million, as a strong signal to avoid similar behavior. David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 Va. L. Rev. 1871, 1890–91 (2002) (explaining that optimal deterrence maximizes society's total welfare by encouraging potential wrongdoers to avoid unreasonable risks). This provides a greater benefit to society in general, and theoretically decreases the likelihood of future similar litigation, thereby saving judicial resources. *Califano*, 442 U.S. at 701.

This deterrent effect exists whether the funds go to the class members or to cy pres recipients. Bartholomew, *supra*, at 3267. However, the availability of cy pres awards ensures that "defendants are exposed to potential litigation for all types of wrongdoing, not just wrongdoing where damages can be efficiently distributed to individual class members." *Id.*

Taking cy pres-only awards away as an option in class actions "would effectively gut the use of class actions for private enforcement of laws designed to protect consumers." *Id.* at 3246. For example, recent data breach incidents have highlighted companies' massive violations of consumers' privacy. *See* Stacy Cowley, *2.5 Million More People Potentially Exposed in Equifax Breach*, N.Y. Times (Oct. 2, 2017), *available at* http://www.nytimes.com/2017/10/02/business/equifax-breach.html; Tony Romm & Craig Timberg, *Cambridge Analytica Shuts Down Amid Scandal Over Use of Facebook Data*, Wash. Post (May 2, 2018), *available at* http://www.washingtonpost.com/news/the-switch/wp/2018/05/02/cambridge-analytica-shuts-down-amid-scandal-over-use-of-facebook-data/?noredirect=on&utm_term=.71dfd54a6c02. Millions of people were affected by these matters, however there is not *necessarily* a large economic damage to each individual due to these privacy violations. This Court should not make it difficult to defend important rights – such as the right to privacy – by making it more difficult to bring class actions through limiting the availability of cy pres settlements.

Class actions encourage plaintiffs to bring claims that would be low value if brought individually, and therefore unlikely to be brought at all. Cy pres awards facilitate the settlement of these types of claims. Without the availability of cy pres settlements, it would be possible for a defendant to avoid having to make any payment at all simply because it would be infeasible to individually pay each class

member. Cy pres awards remain the best use of non-distributable funds in class actions.

II. THE AVAILABILITY OF CY PRES SETTLEMENTS DOES NOT MOTIVATE ATTORNEYS TO BRING CLASS ACTIONS, ACT IN BAD FAITH, OR DISREGARD ETHICAL RULES.

Petitioners make numerous far-reaching arguments, with little support, about the behavior of class counsel and judges in relation to cy pres settlements. Petitioners claim that cy pres settlements in class actions create a situation "where perverse incentives tempt class attorneys to breach their fiduciary duty to class members." Pet. Br. 16. They also contend that the availability of potential cy pres settlements "incentivizes meritless class actions that a class counsel might otherwise not be able to bring and settle profitably." Pet. Br. 17. They further allege that not only do plaintiffs' attorneys have "an obvious incentive to seek the largest possible portion for themselves," but that they act on that incentive by accepting bargains that are worse for the class. Pet. Br. 22.

The idea that attorneys have more incentive to take a potential cy pres case than any other case, or that they act unethically on that alleged incentive, is unfounded and without merit.

A. There is no incentive for attorneys to take cy pres-only settlement cases.

Petitioners' assertion that there is an incentive for attorneys to seek cases where there may be a cy pres settlement, including a cy pres-only settlement, is baseless. As the Ninth Circuit explained in this case, cy pres-only settlements "are considered the exception, not the rule." *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 741 (9th Cir. 2017). There is also no indication or certainty at the beginning of a case that it is going to be a cy pres-only, or even a partial cy pres case. *See, e.g., In re Heartland Payment Sys, Inc. Customer Data Sec. Breach Litig.*, 851 F.Supp.2d 1040, 1077 (S.D. Tex.—Houston 2012) (noting that settlement agreement was "organized so cy pres relief is triggered only after class members have ample opportunity to file claims.").

Perhaps more importantly, attorney compensation is not treated differently by the court depending upon whether the case is a "regular" class action or a class action that involves a cy pres-only settlement. *See* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized...by the parties' agreement."). The same protections exist in all class actions, regardless of whether the final award involves cy pres money. *See* Fed. R. Civ. P. 23(g)(4) ("Class counsel must fairly and adequately represent the interests of the class); Fed. R. Civ. P. 23(h) (setting out uniform standard of "reasonable attorney's fees" in all certified class actions). In fact,

cy pres settlements are not mentioned at all in Rule 23.

There is no indication that attorneys are awarded any more in cases involving cy pres awards, including cy pres-only settlements, than in a typical class action. *See, e.g., In re Netflix*, 2013 WL 1120801, at *10 (approving attorney fee of 25% of Settlement Fund, noting that it "is similar to that of similar settlements involving cy pres distribution."); *City of Roseville Employees' Retirement System v. Orloff Fam. Tr. UAD 12/31/01*, No. 06-CV-85-WFD, 2011 WL 1882515, at *7 (D. Idaho 2011), *aff'd*, 11-35455, 2012 WL 2046106 (9th Cir. 2012) (finding attorneys' fees award of 25% of common fund reasonable and comparable to award calculated using lodestar); *In re Polyurethane Foam Antitrust Litig.*, 168 F.Supp.3d 985, 1012 (N.D. Ohio 2016) (finding that class counsel is entitled to 24% of the gross settlement amount in case with cy pres distributions). Studies have shown that the median attorney fee in class actions is 24% of the class recovery. Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993- 2008*, 7 J. Empirical Legal Stud. 248, 265 (2010), *available at* http://scholarship.law.cornell.edu/clsops_papers/64. In fact, "as class recovery increases, the fee percentage for attorneys actually decreases, which provides more money for clients." Center for Justice & Democracy ["CJD"], *Fact Sheet: Lawyers' Income and Fees* (July 2012), *available at* http://centerjd.org/content/fact-sheet-lawyers-income-and-fees.

Petitioners argue that plaintiffs' attorneys should only be awarded attorneys' fees based on the "direct and actual recovery by class members," Pet. Br. 18, which, they argue, will require plaintiffs' attorneys to align their interest with the class (namely, if class members do not get paid, the attorneys do not get paid). Again, this argument is without support.

In cy pres-only cases, often the issue is one of feasibility of distribution of the settlement. In this case the district court found that the cost of sending out small payments to the millions of class members (just 6.5 cents before deducting any administrative costs or attorneys' fees, Gaos Br. 49) would exceed the total monetary benefit to the class. Gaos Br. 18. This issue would not be remedied by greater zeal on the part of plaintiffs' counsel. For example, had the settlement here quadrupled, entitling every class member to 26 cents before costs, there would still be the same issue of distributing the monetary award to each class member. Petitioners' argument simply makes no sense.

Moreover, class action settlements, including cy pres-only settlements, are negotiated heavily, scrutinized by courts, and subject to objectors. For example, in this case the settlement award was negotiated before an experienced mediator and subject to a fairness hearing before the district court. *Id.* at 13, 16. In addition, as the Ninth Circuit noted, the district court also "took an extra step, cross-checking this result by using the lodestar method." *In re Google*, 869 F.3d at 848. The court found that class

counsel's documentation of hours reasonably expended and reasonable hourly rate supported the fee awarded here. The same protections against unwarranted or unreasonable fees apply in cy pres-only cases and in all other class actions. There is simply no incentive for attorneys to seek out class actions that might be settled on a cy pres basis.

B. There is no evidence that class counsel act in bad faith or disregard ethical rules in cases involving cy pres-only settlements.

There are rules that govern the conduct of attorneys, including rules regarding bringing meritorious claims. *See* Model Rules of Professional Conduct 3.1 (2016), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html ("A lawyer shall not bring or defend a proceeding...unless there is a basis in law and fact for doing so that is not frivolous..."). Similarly, Fed. R. Civ. P. 23 requires class counsel to "fairly and adequately represent the interests of the class."

Petitioners contend that cy pres-only cases are used as a type of "gamesmanship," stating that cy pres is a way to "create an illusion of relief...while increasing attorneys' fees to class counsel, all at the expense of absent class members." Pet. Br. 27-28. They blatantly ignore the rules of professional responsibility to which attorneys must adhere and the risk assumed by plaintiffs' attorneys, instead

making vast assumptions about the behavior of attorneys simply due to the *perception* of conflicts of interest.

There is no evidence, and Petitioners point to none, that the attorneys in this case, or in cy pres cases generally, are more likely to act in bad faith. Attorneys *do* have an incentive and duty to get the greatest benefit for the class as a whole. There is no bad faith simply because a case settles after an attorney determines that the greatest benefit for the class as a whole is a cy pres-only settlement.

III. CY PRES-ONLY SETTLEMENTS IMPROVE ACCESS TO JUSTICE FOR CLASS MEMBERS.

Underlying this case is the notion of "access to justice" and how it relates to class actions, in particular those involving cy pres-only awards. Cy pres-only settlements offer valuable benefits that improve access to justice not just for class members, but for similarly-situated communities of people. The availability of cy pres-only settlements in class action cases where individual litigation may be irrational for various reasons gives litigants access to counsel and a vehicle through which to assert their rights. Additionally, cy pres awards themselves are designed to go to organizations that are closely related to helping to fix the problems central to the case and that frequently have "access to justice" as part of their mission.

This Court has recognized that the right of access to the courts to seek legal redress is guaranteed by multiple provisions of the Constitution of the United States. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002). That fundamental right is violated by economic roadblocks that preclude the assertion of meritorious claims. *Id.* at 413. A major benefit of class actions is that they give access to the justice system to people who otherwise might not be able to pursue a case. Class actions are useful for individuals, as "such collective efforts offer broader relief, higher stakes and visibility, and greater bargaining leverage." Deborah L. Rhode, *Access to Justice*, 69 Fordham L. Rev. 1785, 1803 (2001), *available at* http://ir.lawnet.fordham.edu/flr/vol69/iss5/11.

This Court has acknowledged this benefit, stating that class actions "may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise." *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 338 (1980). *See also American Pipe*, 414 U.S. at 553; *Geraghty*, 445 U.S. at 402-03. This Court has also noted that a purpose behind Rule 23 is "vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C.L. Rev. 497 (1969)).

Other courts have similarly addressed the access to justice objective of class actions. The Seventh Circuit explained that "[t]he policy at the very core of the class action mechanism is to overcome the

problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997). In addition, the Second Circuit reasoned that a class action is an appropriate means of litigation when there are many injured individuals, but nobody was damaged to a degree that would warrant them bringing a case individually. *Green v. Wolf Corp.*, 406 F.2d 291, 296 (2d Cir. 1968).

As Judge Posner has noted,

> The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all.

Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004). Thus, the ability to successfully bring a class action preserves a plaintiff's ability to assert their legal rights and advances democratic participation in the justice system.

Petitioners argue that class certification is inappropriate in this case, and in cases when it is impossible to distribute the settlement proceeds to class members, that is, when the resulting

settlement is a cy pres-only award. Pet. Br. 18. Prohibiting certification of a class simply because a settlement contemplates a cy pres-only award would severely limit an individual's access to the courts. The smaller the individual claim, the greater the benefit of a class action. *Hughes v. Kore of Indiana Enterprise, Inc.*, 731 F.3d 672, 675 (7th Cir. 2013) (reversing and remanding a decertification order in a consumer class action). Small stakes claims, such as this one, are rarely pursued and make individual litigation irrational. Certifying a class when it is not clear that class members will be directly compensated, or when it is likely that there will be cy pres-only relief, allows for these class actions to go forward with the resources it needs to proceed. In such cases, cy pres awards "amplify the effect of the modest damages in protecting consumers." *Id.* at 676.

Moreover, cy pres-only awards are in line with guidelines regarding the appropriateness of a settlement. The Manual for Complex Litigation states, "[a]dequacy of the settlement involves a comparison of the relief granted relative to what class members might have obtained without using the class action process." Manual for Complex Litigation (Fourth) § 21.62 (2004). To that end, "since [cy pres-only] settlements provide greater access to justice than otherwise possible, they provide sufficiently valuable relief—even without providing class members monetary compensation." Bartholomew, *supra*, at p. 3264. For example, in this case class counsel sought cy pres recipients that dealt with privacy issues and would use the funds to educate class members about the risks involved with internet use. Gaos Br. 14.

These recipients were adequate, as they provide more relief to the class than class members might have obtained on their own.

It is also important to note that cy pres-only awards themselves go to organizations that support the interests of the class and generally support access to justice. Moreover, various states have rules requiring that cy pres remainders go to benefit legal aid groups within the state. *See* ABA Br. 16. These ideas are discussed in detail by the American Bar Association, and therefore are not discussed here. *See generally* ABA Br. However, AAJ believes that it is important to recognize that not only is access to justice is realized by giving class members the opportunity to be a part of a class action that may not be brought otherwise, but it is often promoted by the organizations receiving cy pres money as well.

The ability to assert a right has value far beyond direct compensation. Certification of class actions that might result in cy pres-only settlements allows citizens to access the justice system when they otherwise could not. Class actions should not be limited to cases in which individual class member compensation is certain. Such a limitation would stifle the ability of individuals to obtain relief through institutions of justice.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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